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Supreme Court

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In The
Supreme Court of the United States

October Term, 1989

IN RE GABRIEL INTERNATIONAL, INC.,

Petitioner.

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITIONS FOR WRITS OF
MANDAMUS OR CERTIORARI**

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I. STATEMENT OF THE CASE

Respondents¹ accept as accurate the statement of the case presented by the Petitioner.

¹ This brief is filed on behalf of Respondents, M&D Industries of Louisiana, Inc., Patriot Chemical & Equipment Corporation, Don Burts, and Gerald Hebert, all of whom are defendants in the District Court and were Respondents in the Court of Appeals for the Fifth Circuit. A correct listing of the parties to the proceedings appears in Petitioner's Petition for a Writ of Mandamus or Certiorari on page iii.

II. REASONS FOR DENYING THE PETITIONS FOR WRITS OF MANDAMUS OR CERTIORARI

A. The Court of Appeals for the Fifth Circuit Properly Denied Petitioner's Application for Permission to Appeal from an Interlocutory Decision.

1. 28 U.S.C. § 1292(b) Gives the Court of Appeals for the Fifth Circuit Full Discretion to Deny Permission to Appeal from an Interlocutory Decision.

The Court of Appeals for the Fifth Circuit had full discretion to deny Petitioner's petition for appeal from an interlocutory order. 28 U.S.C. § 1292(b) reads, in relevant part, as follows:

The Court of Appeals which would have jurisdiction of an appeal of such action *may* thereupon, *in its discretion*, permit an appeal to be taken from such order . . . (emphasis added)

B. The Court of Appeals for the Fifth Circuit Properly Denied Petitioner's Application for a Writ of Mandamus or of Prohibition.

1. 28 U.S.C. § 1651(a) Gives the Court of Appeals for the Fifth Circuit Full Discretion to Deny Petition for a Writ of Mandamus or Prohibition.

The Court of Appeals for the Fifth Circuit had full discretion to deny Petitioner's petition for the extraordinary writs of mandamus or prohibition. 28 U.S.C. § 1651(a) reads as follows:

The Supreme Court and all courts established by Act of Congress *may* issue all writs necessary or

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (emphasis added)

2. Strong Public Policy Considerations Argue Against Use of Writs as a Substitute for Appeal.

This Court has repeatedly articulated the strong public policies against piecemeal litigation through the appeal of interlocutory decisions. *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 30, 63 S.Ct. 938, 943-944 (1943); *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124 (1976); *Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 274 (1967). Recognition of the vices inherent in interlocutory appeals has led this Court to consistently resist requests to enlarge the scope of interlocutory appeals. See for example *Richardson-Merrel, Inc. v. Koller*, 472 U.S. 424, 432, 105 S.Ct. 2757, 2762 (1985); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480, 98 S.Ct. 2451, 2453 (1978); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474, 98 S.Ct. 2454, 2461 (1978).

Because a writ of mandamus or prohibition can serve to review an interlocutory decision, this Court has made it clear that the extraordinary writs should not be used as a substitute for an appeal. *Will*, 389 U.S. at 97, 88 S.Ct. at 274.

[W]hile a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.

Roche, 319 U.S. at 26, 63 S.Ct. at 941.

In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court.

Roche, 319 U.S. at 32, 63 S.Ct. at 945.

3. Petitioner Must Show Both that it has no Alternative Means to Attain Relief and that its Right to a Writ is Clear and Indisputable.

To ensure that extraordinary writs issue only in extraordinary circumstances, this Court has promulgated guidelines for the use of writs. The Court has set forth the following conditions, reiterated recently in *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, ___ U.S. ___, 109 S.Ct. 1814, 1822 (1989), which must be met before a court may issue a writ:

Among these [conditions] are that the party seeking issuance of the writ have *no other alternative means to attain the relief he desires*, and that he satisfy "the burden of showing that [his] right to issuance of the writ is '*clear and indisputable*.' ". . . . Moreover, it is important to remember that issuance of the writ is in large part a matter of *discretion* with the court to which the petition is addressed. (emphasis added, citations omitted)

Kerr, 426 U.S. at 403, 96 S.Ct. at 2124.

Application of these guidelines to the instant case leads to the conclusion that a court consider the request for a writ and proceed to exercise its discretion by either issuing or refusing to issue the writ only if Petitioner is

able to show that: 1) no alternative means of relief are open to him; *and* 2) that he has a clear and indisputable right to the writ.

4. Issuance of a Writ would be Improper because Petitioner has Alternative Means for Attaining Relief.

The District Court order which is the basis for the Petition calls on Petitioner to appear for an evidentiary hearing to establish the existence of a trade secret. Petitioner may be able to obtain relief from the effects of the order by successfully establishing the existence of a trade secret. Should Petitioner fail to establish the existence of a trade secret, the District Court is likely to dismiss Petitioner's case on the merits. Petitioner will not, in that event, be without alternative means of relief since it could then take an appeal of right to the Court of Appeals for the Fifth Circuit and obtain a review on the merits of the District Court's order.

Thus, Petitioner undeniably has available to it recognized and well established alternative means of seeking relief from the District Court's order. Petitioner's request for a writ should be summarily denied because a writ may only issue if a petitioner has no alternative means for seeking relief.

5. Issuance of a Writ would also be Improper because Petitioner's Right to a Writ is not Clear and Indisputable.

Petitioner argues that its complaint presents three essential substantive issues: 1) whether petitioner is the

owner of trade secrets; 2) whether there has been misappropriation of those trade secrets; and 3) the amount of damages sustained. The essence of Petitioner's argument is that by requiring Petitioner to establish the first of these substantive issues in an evidentiary hearing, the District Court will deprive Petitioner of its constitutionally guaranteed right of trial by jury, which Petitioner has timely requested.

(a) A litigant's right to a jury trial is not absolute.

It is indisputable that the right to a trial by jury is not absolute. Exceptions to and qualifications of the basic constitutional right to a trial by jury have been long recognized. For example, Fed. R. Civ. P. 50 provides for a directed verdict and for a judgment notwithstanding the verdict. Another device which effectively denies a party a trial by jury is the summary judgment, Fed. R. Civ. P. 56. These devices are used specifically to take the factual determination out of the hands of the jury. In a very real sense, use of these devices negates a party's right to a trial by jury; yet these devices are well established and have not been held to be a violation of the constitutional right to a jury trial.

The contention that procedural devices which have the effect of depriving a party of its right to a trial by jury are automatically in violation of the constitutional right to a trial by jury has long ago been discredited. In the context of the summary judgment device, for example, 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 2714 (1983) states that:

As early as 1902 the Supreme Court addressed itself to the problem whether the summary judgment procedure in force in the District of Columbia was constitutional. It stated:

If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as a means to delay the recovery of just demands. Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial. . . .

As stated by Robert Dodge, one of the members of the original Advisory Committee:

In reality, the rule [Fed. R. Civ. P. 56] does not interfere in the slightest degree with the right of trial by jury, because the court can not, of course, enter a summary judgment if there is any issue of fact to be tried, and if the court erroneously orders a summary judgment, the right of appeal will protect the party.

(b) The District Court's power to summarily dispose of frivolous claims derives from Fed. R. Civ. P. 16.

In the analysis that follows, we first discuss the propriety of the District Court's stated grounds for its rulings. We next proceed to show that what the District Court has done, in substance if not in precise form, is to properly order the convening of a pretrial conference. It

is at this pretrial conference that the District Court sought to issue, if appropriate, a *sua sponte*, summary judgment.

The District Court states three grounds in its rulings. Cited are Fed. R. Civ. P. 1, 26, and 16. Rule 1 states that the Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." The District Court cited Rule 1 in conjunction with Rule 26(c) on protective orders, and it was in the context of a protective order that the Respondents requested and were granted a hearing on the existence of a trade secret. In its original Ruling of August 29, 1989, the District Court stated:

Thus, while Fed. R. Civ. P. 26(c) permits the court to issue a protective order to protect a party or person from annoyance, oppression or undue burden, this ability must be interpreted in light of the directive in Rule 1. In this instance, compliance with the speedy and inexpensive instruction of Rule 1 dictates that the plaintiff first establish the existence of a trade secret before consideration of whether we should definitively grant or deny defendants' motion.

In its Amended Ruling of September 12, 1989, the District Court determined that it derived additional authority from Fed. R. Civ. P. 16, which deals with pretrial conferences. Fed. R. Civ. P. 16 reads, in part, as follows:

(a) *Pretrial Conferences; Objectives.* In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of a lack of management;

(3) discouraging wasteful pretrial activities; . . .

* . . . *

(c) *Subjects to be Discussed at Pretrial Conferences.* The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; . . .

In substance, if not in form, the hearing prescribed by the District Court was a pretrial conference. While neither the District Court nor the parties labelled the hearing as such, it is clear that the hearing would, in effect, be a pretrial conference. The purposes of the hearing were: to expedite the disposition of the action; to establish early and continuing control so that the case will not be protracted because of a lack of management; and, most particularly, to discourage the wasteful pretrial activities, specifically, the discovery proposed to be carried out by all parties to the case. The three purposes closely track the above-quoted objectives of pretrial conferences in Rule 16(a).

Rule 16(c)(1), which was added in 1983, gives powerful support to the propriety of the District Court's action. Rule 16(c)(1) empowers the court to eliminate frivolous claims. Inferred is that, in the event that all the claims are frivolous or based on a common frivolous ground, the court is empowered to dismiss the case. The Notes of

Advisory Committee on Rules – 1983 Amendment, accompanying Rule 16(c)(1) state:

The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. . . . *The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference. There is no real reason to require that this await a formal motion for summary judgment. Nor is there any reason for the court to wait for the parties to initiate the process called for in Rule 16(c)(1).* (emphasis added)

As the Notes of the Advisory Committee make clear, the court is specifically authorized to initiate the elimination of frivolous claims *sua sponte* in a pretrial conference. Respondents assert that what the District Court has proposed is to conduct a *sua sponte* summary judgment-proceeding. Such a procedure is perfectly proper under the Federal Rules of Civil Procedure.

(c) *Sua sponte* declaratory judgments are proper.

That a court may issue a declaratory judgment on its own initiative, as for example, in the context of a pretrial hearing, is well established. "[I]f the pretrial judge determines that no genuine issues of fact exist, he may direct the entry of judgment, which is tantamount to the grant of a summary judgment motion." 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1529 (1971). This was true even prior to the 1983 amendment to the Federal

Rules which introduced Rule 16(c)(1). For example, it is stated in 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2720 (1983):

Although Rule 56 specifically states that a summary judgment motion may be made by any party, it does not provide for a situation in which neither party moves under Rule 56 and the court desires to enter summary judgment *sua sponte*. . . . The major concern in cases in which the court wants to enter summary judgment without a Rule 56 motion by either party is not really one of power. As a practical matter, the court always can "invite" the appropriate party to move under Rule 56 when it thinks the case is ripe for summary disposition. Rather, the question raised by the court's action is whether the party against whom the judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted. If the court provides this opportunity, there seems to be no reason for preventing the court from acting on its own. To conclude otherwise would result in unnecessary trials and would be inconsistent with the objective of Rule 56 of expediting the disposition of cases. (references omitted)

There is abundant case law on the subject. For example, one court has stated:

Summary disposition of a cause may logically and properly follow a pre-trial conference when the pre-trial procedures disclose the lack of a disputed issue of material fact and the facts so established indicate an unequivocal right to judgment favoring a party.

Wirtz v. Young Elec. Sign Co., 315 F.2d 326, 327 (10th Cir. 1963).

(d) **Petitioner had the notice required by a *sua sponte* summary judgment.**

This Court has recently reiterated its acceptance of the concept of court-initiated summary judgment:

[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.

Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554 (1986).

The Court, in *Celotex*, placed a caveat on the propriety of the *sua sponte* summary judgment. Specifically, the Court properly required that the losing party will have been put "on notice that she had to come forward with all of her evidence." *Celotex*, 477 U.S. at 326, 106 S.Ct. at 2554. For the court-initiated summary judgment to be proper, the losing party must have been on notice that it will be facing, in effect, a summary judgment proceeding, i.e., that if it does not prevail in the proceeding, it may, in the case of a plaintiff, have some of its claims, or its entire case dismissed.

There is little doubt that Petitioner was fully on notice. A passage from page 5 of Plaintiff's Memorandum in Support of its Motion to Recall; Alternatively to Certify the Existence of a Controlling Issue of Law; Alternatively to Stay the Proceedings, signed by Petitioner's counsel on September 5, 1989, shows that Petitioner fully realized that if it did not prevail in the pretrial hearing on the existence of a trade secret, its case would be dismissed:

The order of the Court . . . commands plaintiff to prove to the Court . . . the existence or not of the trade secret which plaintiff affirmatively alleges in his complaint as part of the cause of action sought to be submitted for determination by a jury. *Obviously, should the Court decide, after such an evidentiary hearing, that plaintiff has failed to prove by a preponderance of the evidence the existence of a trade secret, plaintiff's complaint inexorably will be dismissed.* (emphasis added)

- (e) Respondents have made a prima facie showing that Petitioner has no protectable trade secrets.

The controlling law is the Louisiana Uniform Trade Secrets Act of 1981 (LSA-R.S. 51:1431 *et seq.*). To invoke the Act, there must be a showing of the misappropriation of a trade secret. Clearly, for misappropriation to be possible, there must first be a trade secret. Hence, the threshold inquiry in every trade secrecy case is whether a trade secret in fact exists. *Wheelabrator Corp. v. Fogle*, 317 F. Supp. 633, 636 (W.D. La. 1970), *aff'd*, 438 F.2d 1226 (5th Cir. 1971); *Engineered Mechanical Servs. v. Langlois*, 464 So.2d 329, 333 (La. App. 1st Cir. 1984), *cert. denied*, 467 So.2d 531 (1985).

The Louisiana Trade Secrets Act defines "trade secret" in § 1431(4) as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper

means by other persons who can obtain economic value from its disclosure or use, and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Because the two parts (a) and (b) of the definition of "trade secret" are in the conjunctive, both must be met for a trade secret to exist. In order to simplify the issues here, we will ignore part (b) of the trade secret definition and focus our attention on part (a).

Part (a) of the definition of trade secret itself contains two criteria which are also stated in the conjunctive. To be a trade secret, the matter must not have been generally known by those who can derive economic value from such knowledge and the matter must not be readily ascertainable by proper means by those who can derive economic value from disclosure or use of the matter.

Because both criteria of part (a) are in the conjunctive, a trade secret cannot exist unless both are satisfied.

Comment (e) to § 1431 of the Louisiana Uniform Trade Secret Act elaborates on the significance of the requirement that to be a trade secret a matter must not be generally known or ascertainable by proper means.

The language "not being generally known to and not being readily ascertainable by proper means by other persons" does not require that information be generally known to the public for trade secret rights to be lost. If the principal person who can obtain economic benefit from information is aware of it, there is no trade secret. . . . Information is readily ascertainable if it is available in trade journals, reference books, or published materials.

Respondents have submitted to the District Court voluminous factual evidence that Petitioner's "trade secrets" are generally known in the industry and that, as a result, Petitioner has no trade secrets in connection with its products in this suit. The evidence consists of abundant proof demonstrating that the use of ground peanut shells as an additive in oil well drilling fluids is and has long been generally known and that this information is readily ascertainable from the published literature. The evidence consists of a large number of U.S. patents, dating back to 1956, and a variety of publicly available source materials, including trade publications and reference books.

Petitioner must be able to prove that its purported "trade secrets" were not generally known because it is impossible for a trade secret to exist if it was generally known. What Petitioner must prove is that the information in question was not known in publicly available sources, such as patents, trade publications, and reference books. No amount of discovery on the part of Petitioner or Respondents will help Petitioner prove that the information was not publicly available. It is for this reason that, while Petitioner has had no opportunity to conduct any discovery, *sua sponte* summary judgment is entirely proper in this case. Since discovery could not have helped Petitioner prove the existence of trade secrets, no discovery was required before the District Court initiated summary judgment-type proceedings.

The District Court appreciated the irrelevance of discovery in this context. On page 4 of its Amended Ruling of September 12, 1989, the District Court states:

We find that if a trade secret or secrets exist and that plaintiff is the owner, the plaintiff necessarily, and without the need to resort to depositions, interrogatories or any other form of discovery is now in a position to present in secrecy the evidence required to determine that a trade secret or secrets exist and that plaintiff is the owner thereof.

(f) Petitioner's right to the writ is far from clear and indisputable.

It is thus obvious that it was perfectly proper for the District Court to schedule a *sua sponte* summary judgment hearing. The proposed procedure is perfectly in keeping with the well-established policies of expediting court actions and avoiding unnecessary expenses. Petitioner's right to the writs sought thus falls far short of being "clear and indisputable." In order to qualify for a writ, Petitioner must demonstrate that his right to the writ is clear and indisputable; it is evident therefore that Petitioner is not entitled to the writs it seeks.

C. That the District Court's Order may Implicate Petitioner's Right to a Jury Trial does not Alter the Conclusion that the Fifth Circuit's Denial of Petitioner's Application for a Writ of Mandamus or of Prohibition was Proper.

1. Petitioner's Assertion that the Right to a Jury Trial Must be Protected by a Writ of Mandamus is Unsupported by the Case Law and Inconsistent with Public Policy Considerations.

Petitioner's entire argument rests on the premise that the right to a jury trial is somehow more essential than other constitutional rights. Petitioner would have this

Court discard clear and well established public policy principles disfavoring the piecemeal appeal of interlocutory decisions and rule that, because Petitioner's right to a jury trial might be implicated, a writ of mandamus must issue. Petitioner bases its argument primarily on two Supreme Court cases, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894 (1962).

Petitioner's arguments are not well taken and its reliance on *Beacon Theatres* and *Dairy Queen* is misplaced. As an analysis of these cases and of the related case law will show, the considerations involved with respect to the issuance of a writ of mandamus where the right to a jury trial is implicated are no different, and on policy grounds ought not to be any different, than in any other case.

- (a) **The right to a jury trial in a civil case is no more important than other constitutional rights.**

It is indisputable that a great deal of federal litigation involves constitutional rights. Whether judicial review of the litigation comes at the end of the trial court's proceedings, or at some intermediate point, is not, and for policy reasons should not be, dictated by the nature of the constitutional right. The right to a jury trial in civil cases is not one of the most essential constitutional rights. Of the first eight Amendments to the United States Constitution, the Seventh Amendment guarantee of a jury trial in a civil case is one of only three individual rights, along with the Second Amendment guarantee of the right to

bear arms and the Fifth Amendment guarantee of indictment by a grand jury in criminal prosecution, which this Court has explicitly found to be inapplicable to the states. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 596 (1916).

(b) *Beacon Theatres* does not support Petitioner's position.

Petitioner relies heavily on *Beacon Theatres* for the proposition that a writ of mandamus must issue where the right to a jury trial has been denied. A closer examination reveals that the case does not stand for the proposition for which it has been cited, but is, instead, consistent with the position that cases implicating the right to jury trial should be treated, for the purposes of mandamus, no differently than cases implicating any other rights.

In *Beacon Theatres*, the Court concludes that "we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." *Beacon Theatres*, 359 U.S. at 511, 79 S.Ct. at 957. A footnote at the end of the quoted passage cites a number of cases, among them two Supreme Court cases, *In re Simons*, 247 U.S. 231, 38 S.Ct. 497 (1918) and *In re Peterson*, 253 U.S. 300, 40 S.Ct. 543 (1920). The *Peterson* opinion approvingly cited *Simons* in denying a petition for writs of mandamus and/or prohibition. This makes *Simons* the more important source for the proposition quoted above in *Beacon Theatres*.

Simons involved two counts of breach of a contract to make a will. The case arose before the merging of the

equity and law courts. The trial judge transferred one of the two counts to the equity side, raising the possibility of two trials. The plaintiff sought, and the Supreme Court granted, a writ of mandamus to undo the trial court's action.

Had the Court not granted the writ, it is quite possible that the equity count would have gone to a bench trial before the jury trial on the law count could be held. In that case the decision of the equity court might have foreclosed the law claim through collateral estoppel (issue preclusion) or *res judicata* (claim preclusion). Because the plaintiff could not appeal the equity judgment on the basis of denial of a jury trial, the effect would have been the denial, nonredressable on appeal, of a jury trial on the legal count. It is this foreclosure of review of the right to a jury trial, the lack of alternatives for relief, which prompted the Court to issue the writ.

A similar situation recurred in *Beacon Theatres* where the plaintiff sought a declaratory judgment that a film licensing arrangement did not violate the antitrust laws. The defendant counterclaimed, seeking treble damages. The trial judge, dubbing the plaintiff's claim "equitable", ordered the plaintiff's claim to be tried first in a bench trial. The resolution of certain issues in the equity litigation would have been binding on the parties in the subsequent legal litigation through the doctrine of issue preclusion.

In granting a writ of mandamus, the Court in *Beacon Theatres* strongly intimated that it was the lack of alternative relief, not, as Petitioner in the instant case would

have this Court believe, the implication of the right to a jury trial, which justified the issuance of the writ:

Thus the effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," for *determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim."*

Beacon Theatres, 359 U.S. at 504, 79 S.Ct. at 953.

To justify use of the writ there must be an absence of alternatives for relief. Where, as in the instant case, alternatives for relief exist, a writ should not issue.

(c) *Dairy Queen* does not support Petitioner's position.

Petitioner also relies heavily on *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894 (1962) for the proposition that a writ of mandamus must issue where a right to a jury trial has been denied. A closer examination reveals that, as was the case with *Beacon Theatres* above, *Dairy Queen* does not stand for the proposition for which it has been cited, and is, instead, fully consistent with the long-standing position of this Court that cases implicating the right to jury trial should be treated no differently, for the purposes of mandamus, than cases implicating any other constitutional rights.

The Court in *Dairy Queen* cites *Beacon Theatres* as emphasizing "the responsibility of the Federal Courts of Appeals to grant mandamus *where necessary* to protect the

constitutional right to trial by jury." (emphasis added) *Dairy Queen*, 369 U.S. at 472, 82 S.Ct. at 897.

In *Dairy Queen*, the District Court denied a party's request for a jury trial on the ground that the case contained equitable as well as legal issues. The Supreme Court issued a writ of mandamus to compel the District Court to try all the issues in a single jury trial. Again, as in *Beacon Theatres*, the absence of alternative remedies justified the issuance of the writ. In the absence of a writ, a single bench trial would have been held. On direct appeal there would have been no reason to reverse the findings as to the equitable claims and the party would have been irreparably deprived of its right to a jury trial of the "incidental" equitable issues.

- (d) The Supreme Court has reversed the issuance of a writ of mandamus where the right to a jury trial was denied through the granting of a new trial.

In a more recent case, this Court has reiterated its views on the guidelines for the issuance of writs of mandamus. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-36, 101 S.Ct. 188, 190 (1980). The case offers many parallels with the instant case. Daiflon brought an anti-trust suit against a number of defendants and was awarded large monetary damages by a jury. The trial court granted a motion for new trial. Daiflon successfully petitioned the Court of Appeals to reinstate the jury verdict. The Court of Appeals in issuing a writ of mandamus explicitly found that, by granting the motion for new trial, the trial court "invaded the province of the jury as the primary trier of fact, and interfered with Daiflon's

right to a jury trial under the Seventh Amendment." (citations omitted) *Daiflon, Inc. v. Bohanon*, 612 F.2d 1249, 1260 (10th Cir. 1979).

The invasion of the right to a jury trial in the *Daiflon* case was at least as egregious as in the instant case. When the court took the case away from the jury, the jury had already spent four weeks in trial and deliberations and had returned a verdict. In the instant case, by contrast, the litigation was still in its early pretrial stages when the trial court called for an evidentiary hearing to resolve the issue of the existence of a trade secret.

Despite the egregious denial of a right to a jury trial, this Court saw fit, in *Allied*, to reverse the Court of Appeal's granting of a writ of mandamus. This Court stated at the outset that an order granting a new trial is interlocutory in nature and therefore not immediately appealable. The order in the instant case, calling for an evidentiary hearing to consider, in effect, a *sua sponte* summary judgment, is likewise an interlocutory decision which is not immediately appealable.

This Court then pointed out that the ordering by a trial court of a new trial will seldom, if ever, justify the issuance of a writ of mandamus. The Court reiterated that the writ of mandamus is a drastic remedy which should only be invoked in the face of extraordinary circumstances. The Court again restated the conditions under which the writ may issue:

In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he

desires, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" (citations omitted)

Allied Chem., 449 U.S. at 35, 101 S.Ct. at 190.

In words which could equally well apply in the instant case, the Court concluded that a writ was inappropriate because Daiflon had alternatives for relief and, independently, because Daiflon's right to this writ was not clear and indisputable since the granting of the writ was subject to the Court's discretion:

A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires." The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." (citations omitted)

Allied Chem., 449 U.S. at 36, 101 S.Ct. at 191.

III. CONCLUSION

The Court of Appeals for the Fifth Circuit had full discretion to deny Petitioner's application for permission to appeal from an interlocutory decision. Its denial was thus proper.

The Court of Appeals was not in the position to have exercised its discretion in issuing a writ of mandamus or prohibition and properly denied the petition stating that review by mandamus or prohibition "is not shown to be

appropriate in this case." For the Court of Appeals to have been in a position to exercise its discretion, Petitioner would have had to have shown that it lacked alternative avenues of relief and that its right to a writ was clear and indisputable. Neither of the two conjunctive conditions was satisfied in this case. Petitioner had, and continues to have, ample alternative avenues of appeal, for example, by appeal of right on the merits to the Court of Appeals. Additionally, Petitioner's right to a writ is far from clear and indisputable, since the procedure complained of amounts to a permissible *sua sponte* summary judgment. The Court of Appeals' rejection of the petition for a writ of mandamus or of prohibition and its characterization of the petition as inappropriate was thus proper and should be affirmed.

Furthermore, since issuance of a writ of mandamus or prohibition is at the discretion of the Court of Appeals, the Court of Appeals' denial of Petitioner's petition for writs of mandamus or prohibition would still have been proper even if Petitioner had no alternative means of relief and its right to a writ had been clear and indisputable.

For the reasons stated herein, the Writs of Mandamus and Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

GABRIEL INTERNATIONAL, : CIVIL ACTION
INC.

-vs-

: NO. 89-1640-O

M & D INDUSTRIES OF
LOUISIANA, INC., PATRIOT
CHEMICAL & EQUIPMENT
CORPORATION, DON BURTS : JUDGE SCOTT
AND GERALD HEBERT

RULING

Before us is defendant's Motion for a Protective Order under Fed. R. Civ. P. 26(c).

Plaintiff, Gabriel International, Inc., brought this diversity suit against defendants, M & D Industries, Patriot Chemical, Don Burts and Gerald Hebert, alleging misappropriation of a trade secret in violation of the Uniform Trade Secrets Act, LSA-R.S. 51:1431 *et seq.* To prevail on such a charge, the plaintiff must establish (1) possession of knowledge or information that is not generally known; (2) communication of this knowledge or information by the plaintiff to the defendant under an express or implied agreement limiting its use or disclosure by the defendant; and (3) use or disclosure by the defendant of this knowledge or information in violation

of the confidence, to the injury of the plaintiff. *Wheelabrator Corp. v. Fogle*, 317 F. Supp. 633, 637 (W.D. La. 1970) (citing *Great Lakes Carbon Corp. v. Continental Oil Co.*, 219 F. Supp. 468, 498 (W.D. La. 1963)). Clearly, the threshold issue is "whether in fact there was a trade secret to be misappropriated." *Id.* Here, the plaintiff has not yet established the existence of a trade secret nor, for that matter, the existence of an express or implied agreement limiting its disclosure by the defendant.

In the Memorandum in Support of the Motion for a Protective Order, defendants contend that plaintiff's subpoena of defendants' principal customers is an attempt to harass and alienate these customers. Defendants further contend that the information sought by the plaintiff from these customers could be directly obtained from defendants.¹

Fed. R. Civ. P. 1 commands that the procedural rules "shall be construed to secure the just, *speedy*, and *inexpensive* determination of every action." (Emphasis added). The discovery provisions "are subject to the injunction in Rule 1" *Herbert v. Lando*, 441 U.S. 153, 177, 60 L.Ed.2d 115, 134 (1979). Thus, while Fed. R. Civ. P. 26(c) permits the court to issue a protective order to protect a party or person from annoyance, oppression or undue burden, this ability must be interpreted in light of the directive in Rule 1. In this instance, compliance with the speedy and inexpensive instruction of Rule 1 dictates that the plaintiff first establish the existence of a trade secret before consideration of whether we should definitively grant or deny defendants' motion.

Accordingly, based on the foregoing law and facts, we find it inappropriate at this time to grant defendants' motion. Rather, we order that an evidentiary hearing be held on September 6, 1989 at 10:00 a.m. at which hearing the plaintiff shall be required to prove, by a preponderance of the evidence, the existence of a trade secret by evidence including the substance of the trade secret, its origin and duration, its secret and exclusive character since origin, and the measures taken to preserve its secret and exclusive character to date. Should the plaintiff carry this burden, the court will reconsider defendants' motion.

Therefore, we DENY defendants' motion, subject to a right of renewal, such right to be determined after the evidentiary hearing of September 6, 1989.

DONE AND SIGNED at Alexandria, Louisiana, this 29th day of August, 1989.

/s/ Nauman S. Scott
UNITED STATES DISTRICT
JUDGE

FOOTNOTES

¹ Defendants have also counterclaimed under the Louisiana Unfair Trade & Consumer Protection Act, LSA-R.S. 51:1401 *et seq.* For the reasons which follow, this action is stayed pending the outcome of the evidentiary hearing set for September 6, 1989 at 10:00 p.m.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

GABRIEL INTERNATIONAL, : CIVIL ACTION
INC.

-vs- : NO. 89-1640-O

M & D INDUSTRIES OF
LOUISIANA, INC., PATRIOT
CHEMICAL & EQUIPMENT
CORPORATION, DON BURTS : JUDGE SCOTT
AND GERALD HEBERT

AMENDED RULING

We issue this Ruling to amend and complement our
Ruling of August 29, 1989.

On July 21, 1989 Gabriel International, Inc. (Gabriel) filed a complaint against M & D Industries of Louisiana, Inc. (M & D), Patriot Chemical & Equipment Corporation (Patriot), Don Burts (Burts), and Gerald Hebert (Hebert) seeking injunctive relief and damages under Louisiana's Uniform Trade Secret Act (LSA-R.S. 51:1431, *et seq.*). The complaint seeks damages, injunctive relief and an immediate issuance of an order by the Court providing that the record of this action be sealed; that all persons involved in the litigation be enjoined from disclosing plaintiff's alleged trade secret without prior court approval and any

disclosure of plaintiff's alleged trade secret in the progress of litigation shall be restricted to parties and counsel for the parties and their assistants. Plaintiff also prayed for trial by jury.

A form of order for secrecy and for sealing the record was attached to the record and the execution of such order by the court is authorized under LSA-R.S. 51:1435 which provides as follows:

"In an action under this Chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."

Upon examining the complaint the Court noted that there was absolutely no evidence or affidavit attached to support plaintiff's allegation that a trade secret or secrets existed or that the plaintiff was the owner thereof. The only reference to the existence to such an order is found in paragraph three of the complaint which merely tracks the conclusory language of the statute and adds that plaintiff requires its employees to execute secrecy agreements as a condition to their employment. Naturally plaintiff did not produce evidence at the time of filing its complaint because the order preserving the secrecy of such evidence had not yet been signed. Certainly a formula, pattern, compilation [sic], program, device, method, technique or process which has at any time been open to public knowledge, cannot thereafter be made secret by inserting a clause in employment contracts or

by any other process. The Court felt under the circumstances that the order should not be signed *ex parte* without allowing some delay for possible opposition. No opposition having been filed and upon the telephone request of plaintiff's attorney, the Court signed the order on August 11, 1989, some 21 days after the filing of the complaint.

On the same date, August 11, 1989, the Clerk of Court in Shreveport, Louisiana received and filed defendants' Motion for an Expedited Hearing and a Protective Order followed later by defendants' Answer and Counter-Claims. These pleadings contained *factual* allegations disputing plaintiff's claim that trade secrets existed and that plaintiffs were the owners thereof and documentary evidence in support thereof. Defendants also claimed that the defendants and plaintiff are competitors and that all of the information sought from five of its customers noticed by plaintiff for deposition could be furnished by defendants and that these depositions and the entire proceedings are being pursued to harass defendants to embarrass them in their relationship with their customers and to adversely affect their business.

The vigor with which this case has been prosecuted in the approximately one month of its existence prior to our discussions and hearing of Friday, August 25, 1989 has convinced this Court that these proceedings are unusually controversial; that they promise to be voluminous, detailed and a great expense to the parties. Our examination of LSA-R.S. 51:1431 *et seq.* and the authorities cited in our Ruling of August 29, 1989 has convinced us that plaintiff has no rights whatsoever unless a trade secret or secrets exist and it is the owner of that trade

secret or secrets. We have already sealed the record and utilized our injunctive powers to assure secrecy in this proceeding. We did this *ex parte*, at the request of plaintiff's counsel and without the support of any evidence whatsoever because we realized that plaintiff could not reveal that evidence until assured of secrecy by our signing its Order on August 11, 1989. Now that the secrecy is assured there is no reason why this evidence should not be produced.

It is plaintiff's position that this is a jury trial; that the trade secret issue is an issue of fact which should be submitted to and decided only by jury and that it is inappropriate that it be submitted to the Court for decision. Stated differently, any plaintiff, even an imposter, could impose the burden, delay, inconvenience and expense (and harassment if brought by an imposter) and the Court is powerless to restrain it. We disagree.

We find that if a trade secret or secrets exist and that plaintiff is the owner, the plaintiff necessarily, and without the need to resort to depositions, interrogatories or any other form of discovery is now in a position to present in secrecy the evidence required to determine that a trade secret or secrets exist and that plaintiff is the owner thereof. In our original Ruling of August 29, 1989, Appendix A attached, we treated this issue as a procedural matter and are fully empowered to act on the basis of the authorities cited therein. We are also empowered under Fed. R. Civ. P. 16(a)(1)(2)(3) and principally (c)(11).¹ Finally it is a question of jurisdiction. This is a diversity action for injunctive relief and damages under the Louisiana's Uniform Trade Secret Act (LSA-R.S.

51:1431, *et seq.*) which is restricted to one class of plaintiffs. Plaintiff must be the owner of a trade secret or secrets. This is a jurisdictional limitation inherent in the statute. Matters of jurisdiction are not required to be presented by motion for summary judgment, by motion for directed verdict, or by interrogatories to the jury. That a court must protect its jurisdiction and has a duty to do so is such a fundamental principle of our federal system that it requires no citation. Although our initial interest was principally procedural, it certainly follows that if plaintiff cannot prove that a trade secret or secrets exist and that it is the owner thereof, this matter will be dismissed for lack of jurisdiction.

For the above reasons it is the opinion of this Court that, unless plaintiff's status as owner of a trade secret is established by stipulation or otherwise, it would be appropriate in every case that the plaintiff establish in a confidential evidentiary hearing that he is an owner of a trade secret as we have held in this proceeding. Therefore we DENY plaintiff's motion that our Ruling of August 29, 1989 as amended and complemented herein, should be vacated. We agree with plaintiff that the Ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. All as is contemplated under the provisions 28 U.S.C. 1292(b).

DONE AND SIGNED at Alexandria, Louisiana, this
12th day of September, 1989.

/s/ Nauman S. Scott
UNITED STATES DISTRICT
JUDGE

FOOTNOTES

¹ As explained by the Advisory Committee, amended Rule 16 shifts "the emphasis away from a conference focuses solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery." Thus, although the listed objectives include improving the quality of trial and facilitating settlement, also mentioned are measures designed to expedite disposition of the action to establish early control of the case with the overall objective of avoiding protracted pretrial activities and litigation. In this instance, our pretrial order of an evidentiary hearing is designed to accomplish these objectives. In *Davis v. Duplantis*, 448 F.2d 918 (5th Cir. 1971), the court stated that "[t]he trial judge must be permitted wide latitude in guiding a case through its preparatory stages. His decision as to the extent that pretrial activity should prevent the introduction of otherwise competent and relevant testimony at trial must not be disturbed unless it is demonstrated that he has clearly abused the broad discretion vested in him by Rule 16." *Id.* at 921.

APPENDIX C
IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 89-4713

IN RE:
GABRIEL INTERNATIONAL, INC.,
Petitioner.

On Petition for Writ of Mandamus and/or
Prohibition to the United States District
Court for the Western District of Louisiana

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition is **DENIED**

IT IS FURTHER ORDERED that petitioner's alternative motion for permission to appeal from an interlocutory decision is **DENIED**

We do not pass on the merits of the district court's challenged order; we merely hold that review by mandamus or prohibition or by interlocutory appeal is not shown to be appropriate in this case.

